No. 16002

United States
Court of Appeals
For the Ninth Circuit

HAROLD ROBERTS, et al., Appellants,

vs.

FEDERAL CROP INSURANCE CORPORATION, Appellee.

Brief of Appellants

Appeal from the United States District Court for the
Eastern District of Washington
Northern Division

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OPINION BELOW

The opinion of the District Court appears in the record, beginning on page 55 to page 69 inclusive.

JURISDICTION

The jurisdiction of the District Court and of this Court is invoked under 7 U.S.C.A. 1506 (d). This cause was removed from the State Courts of Washington to the Federal District Court by stipulation of counsel.

STATEMENT OF THE CASE

This is an appeal from a summary judgment for defendant granted by the District Court for the Eastern District of Washington, Northern Division.

The plaintiffs are all farmers residing in Douglas County, State of Washington (R. 3, 7, 18, 22, 55) who seeded winter wheat in the fall of 1955 (R. 4, 7, 18, 22, 55), and each plaintiff had in force a Crop Insurance Policy (Exhibit A; R. 4, 7, 18, 22, 27, 55)) insuring the policy-holder against loss of his winter wheat crop by winter-kill (Ex. A, Page 1; R. 12).

The policy provisions involved are the Insuring Clause (R. 12), Paragraph 1 R. 12), Paragraphs 4, 8, 14, 17 (R. 13).

In the Spring of 1956 (R. 56), on or subsequent to the 25th day of March, 1956 (R. 72), when the snow had melted it was apparent that the wheat was a "total

loss'' from winter kill (R. 56).

To determine if the insurer (Appellee) would pay for said loss, the farmers in the area called a public meeting on April 9, 1956, at the St. Andrews Grange, St. Andrews, Washington. Mr. Creighton F. Lawson, Washington State Director of defendant corporation attended this meeting (R. 5, 24, 56). Mr. Lawson advised those present that the position of the Federal Crop Insurance Corporation was that if claims were filed at that time for the loss by winterkill, the claims would be rejected.

Mr. Lawson, at the meeting of April 9, 1956, signed the following statement (R. 45):

> ''The undersigned, State Director of Federal Crop Insurance Corporation, does hereby state that if the policy holders of Federal Crop Insurance in Douglas County make a claim under the policies to be paid for the 1956 crops at this time said claims will be rejected in his opinion.
>
> Dated this 9th day of April, 1956.''

Mr. Lawson further stated that it was the Company's position that the policy coverage would not attach to the crop that had been lost by winterkill unless a spring wheat crop was replanted on the same land (R. 30). This position is based on paragraph 4, Exhibit A (R. 13).

After being informed of the Company's position that the loss was not covered by the policy as interpreted by the Federal Crop Insurance Corporation, it was obvious that it would be useless to file claims and appellants were advised by their counsel to reseed for the sole purpose of mitigating appellants' damage (R. 47). Appellants' did reseed to spring wheat and because of peculiar, unpredictable weather circumstances the spring wheat seeded on the acres involved yielded more than the insured minimum so that appellants' only damage, resulting from appellee's failure to pay for the lost crop, was an amount of money equal to the cost of reseeding. (It has never been and is not now the position of appellants that any policy provision covers specifically the cost of reseeding as such. The cost of reseeding is simply the extent of the monetary damage resulting from the breach of the insurance contract by the Company).

That Lawson's statement of the appellee's position was accurate cannot now be disputed. Appellee's Answer (R. 7) and Second Amended Answer (R. 18) both admit or restate it and appellee's manager, in his letter of May 21, 1956, which was written before the expiration of the claims period, adopted, ratified, and approved Lawson's statement of the appellee's position and then restated it for the appellee (R. 52).

On defendant's motion for summary judgment the

trial court, contrary to the terms of the policy, found that filing formal proof of loss was a prerequisite to liability (R. 65).

The District Court further found that the rule applicable to private insurance companies in relation to waiver and / or estoppel resulting from a denial of liability during the period for filing proofs of loss does not apply to the Government (R. 66, 67).

QUESTIONS

1. Is a government corporation which is engaged in the private enterprise field of insurance bound by some of the same rules of business conduct as a private carrier, or is the government entitled to some peculiar legal position because it is the government?

Decision in this case will be determined by the Court's determination of whether the Federal Crop Insurance Corporation is bound by the following contract rules.

The specific rules of contract inherent in the case at bar are:

A. The rule that an ambiguity in an insurance contract must be interpreted in favor of the insured and against the insurer.

B. The rule that denial of liability during the period for filing proofs of loss waives the insurer's

right, and estops the insurer from relying upon this defense in an action on the contract.

ARGUMENT

It is admitted that each of the plaintiffs had a contract of insurance in force with appellee insuring plaintiffs' wheat against loss by winterkill (R. 7, 18, 27).

The applicable policy section (Ex. A, R. 12) is the insuring clause and the first sentence of Paragraph one which states:

> "In consideration of the representations and provisions in the application upon which this policy is issued, which application is made a part of the contract, and subject to the terms and conditions set forth or referred to herein, the Federal Crop Insurance Corporation (hereinafter designated as the Corporation) does hereby insure ———————— (Hereinafter designated as the insured) against unavoidable loss on his wheat crop due to drought, flood, hail, wind, frost, winter-kill, lightning, fire, excessive rain, snow, wildlife, hurricane, tornado, insect infestation, plant disease, and such other unavoidable causes as may be determined by the Board of Directors of the Corporation. (For irrigated acreage, also see section 31.)
>
> In witness whereof, the Federal Crop Insurance Corporation has caused this policy to be issued——.
>
> ————————.
>
> Federal Crop Insurance Corporation
>
> By .....
> State Crop Insurance Director.

TERMS AND CONDITIONS

1. Kinds of wheat insured. The wheat to be insured shall be winter and spring wheat seeded for harvest as grain."

The insurance attached when the crop was seeded. Exhibit A, Paragraph 8 (R. 13), among other things, states:

"Insurance period. Insurance with respect to any insured acreage shall attach at the time the wheat is seeded."

It is admitted that the crop involved in this litigation was planted in the fall of 1955 (R. 4, Para. III, R. 7, Para. II). It therefore follows, under the terms of the contract, that the crop was insured in the fall of 1955 and was insured at the time it was destroyed during the winter of 1955 and 1956.

Paragraph 16, Exhibit A (R. 13) provides:

"16. Time of Loss. Any loss shall be deemed to have occurred at the end of the insurance period, unless the entire wheat crop on the insurance unit was destroyed earlier, in which event the loss shall be deemed to have occurred on the date of such damage as determined by the Corporation."

It is admitted by the corporation in its amended answer, Paragraph II, (R. 7), and its second amended answer, Paragraph II (R. 18) that this insured crop was a total loss in the spring of 1956 when the snow melted off the land.

By the clear terms of the policy as stated above, the appellants had suffered a loss insured against by appellee's insurance during the period of coverage, and are therefore clearly entitled to be paid.

Appellees take the position that in order to recover appellants must plant a second crop (spring wheat) and have it fail before recovery may be had. In other words, appellees take the position that they are not insuring against winter-kill in spite of its own policy terms. Counsel is assuming that the Court will take judicial notice that winter-kill is not a hazard of a spring wheat crop. Conversely appellees, after the loss, say that they did not insure the crop planted in the fall of 1955 but will only insure a subsequent spring wheat crop planted in the same ground.

Appellee's position, as reported by Mr. Lawson (R. 30, 48) and Mr. Fretts, Manager of Federal Crop Insurance Corporation, Washington, D. C. (R. 52) is that Paragraph 4 of Exhibit A is controlling. Paragraph 4 in effect says that if the winter wheat is lost, the coverage on that wheat will not attach until the crop has been replaced by spring wheat. It is nonsensical. This is a denial of coverage on the winter wheat for the risk of winter-kill and is inconsistent with the insuring clause.

Paragraph 4, Exhibit A (R. 13) which provides that

the insurance does not attach on winter-killed wheat acres unless the crop is reseeded is also inconsistent with language of Paragraph 8 which says that the insurance attaches when the crop is seeded, and Paragraph 12, Exhibit A. (R. 13) which states the premium is deemed earned when the crop is seeded.

In order to afford the appellants the coverage they bought, i. e. coverage of winter wheat from loss by winter-kill, these ambiguities must be resolved in favor of the assureds. It is fundamental insurance and contract law that all ambiguities in insurance policies are construed against the company and in favor of the assureds. 29 Am. Jur. Insurance, Section 166, 167, page 180-187.

In *Lawrence vs. Northwest Casualty Co.* (1957) 50 Wn. (2d) 282, 311 Pac. (2d) 670, in a typical statement of the rule, the Washington Supreme Court said:

> "While it is true that if an insurance contract is fairly susceptible of two different interpretations, the one which is most favorable to the insured must be adopted, the rule has no application where the provisions of a policy are neither ambiguous nor difficult of comprehension. *Jeffries v. General Cas. Co. of America,* 46 Wn. (2d) 543, 283 P. (2d) 128. When construing the terms of an insurance policy, the court seeks to determine the intent of the parties, and the general rules governing the construction of contracts must be applied; and the court will give the language its popular and ordinary meaning, unless it is apparent from a reading of the whole instrument that a different or special mean-

ing was intended or is necessary to avoid an absurb or unreasonable result. Christensen v. Sterling Ins. Co., 46 Wn. (2d) 713, 284 P. (2d) 287."

To give the appellee the requested interpretation of its contract would violate not only the spirit of the insurance and contract law that has been developed over the many years, but violates the insuring clause of this policy which specifically insures against winter-kill. Appellee's interpretation forces an absurb result. The ambiguity of the contract becomes more apparent when you consider the only obvious intent of the appellants when buying the insurance was to purchase coverage against all risks, including winter-kill.

If this court holds with appellants on the above matters, then on April 9, 1956, appellants were entitled to be paid for their lost crop. When the Company refused to pay, it repudiated its insurance contract with appellants. The trial court stated that Mr. Lawson could not repudiate the contract and that there had been no repudiation. Appellants' position is and has been (R. 6 and 26) that the Company repudiated by refusing to pay, claiming Paragraph 4 was controlling, and that Lawson merely conveyed to plaintiffs the Company's position. The Company had the capacity to refuse payment and such refusal was a repudiation of the contract. The Company, having repudiated, cannot now defeat plaintiffs' claims on the basis of plaintiffs' failure to file proofs of loss when such failure

was brought about by the obvious futuility of filing proofs after the repudiation.

The rule is clearly stated in 29 Am. Jur., pages 859, para. 1143, as follows:

> "A denial of liability by an insurer, made during the period prescribed by the policy for the presentation of proofs of loss, and on grounds not relating to the proofs, will ordinarily be considered a waiver of the provision of the policy requiring the proofs to be presented, or a waiver of the insufficiency of the proofs or of defects therein. The denial of liability is equivalent to a declaration that the insurer will not pay although proofs are furnished in accordance with the policy, and the law will not require the doing of a vain or useless thing."

In Pagni vs. New York Life Insurance Co., 173 Wn. 322, 23 P. (2d) 6, the rule was set forth by the Washington Supreme Court in the following language at page 333:

> "The position of the respondent is not tenable. If an insurance company denies all liability and the insured, relying upon such denial, omits to file a proof of loss . . . although such proof is required by the terms of the policy. . such company will be deemed to have waived such proof, and will be estopped to offer in defense evidence of the fact that no proof of loss was filed. *Russell vs. Granite State Fire Ins. Co.,* 12 Me. 248, 116 Atl. 554."

The District Court, in its opinion, relied upon three cases in support of the opinion. All three of these cases upon careful analysis are readily distringuishable, and do not, in fact, support appellee's position.

In Felder vs. Federal Crop Insurance Corporation, 146 Fed. (2d) 638, 640 no representations of officials were made until after the time for filing claims had elasped whereas, in the case now before this Court, representations were made and relied upon during the time for filing claims. The Court in the Felder case recognized this when it used the following language: "We might point out that this case involves no element of technical estoppel." It would seem to follow that the Court in the Felder case would recognize the doctrine of estoppel against the government under a proper set of facts. Appellant is of the opinion that the case at bar is squarely within the proper application of the rule of estoppel.

The case of *Mock vs. United States* (10th Cir.), 183 Fed. (2d) 174, is a waiver case. Mr. Mock was advised by a county official not to file a proof of loss. The Court said that there was no showing that the county official was authorized to waive the requirement of proof of loss. As in the case under consideration there was no denial of liability during the period for filing claims, and the court based its decision partly, at least, upon proof that there had been no damage. If appellants claimed that Mr. Lawson personally waived the proof of loss requirement by advising that proofs need not be filed, the Mock case would be in point. That is not appellants' position. In the case

at bar the waiver and / or estoppel arose from an act of the company itself, i. e. taking a position that there was no liability under the terms of the contract. If any authority needs be shown for Lawson in the instant case, it is the authority to speak for the corporation, that is to relate, accurately, the corporate position. This authority was claimed by him (Exhibit C, R. 43), admitted by the company in its pleading (R. 7 and 18), and ratified by the company (Exhibit I, R. 52).

Keeping in mind that waiver is a voluntary relinquishment of a known right and that estoppel pre-supposes some conduct or dealing by which the other is induced to act or forbear to act (*See Reynolds vs. Travelers Insurance,* 176 Wn. 36, 29 (2d) 310) it is apparent that the Mock case is not apt.

In Federal Crop Insurance vs. Merrill, 336 N. S. 380, 68 S. Ct. 1, 92 L. Ed. 10, a policy was written insuring the plaintiff's spring wheat crop, which crop was seeded on land that had already been seeded to winter wheat in the same growing season and the winter wheat crop had failed.

The Merrill case is plainly distinguishable on several sold grounds:

First: The Merrill case involved a situation in which the contract attempted to be entered into was

prohibited by statute. The statute did not permit the Federal Crop Insurance Corporation to insure spring wheat crops on land which during the same season had been seeded to winter wheat. In the case now before this court there arises no question concerning the validity of the contract between plaintiffs and defendant. The Merrill case was an attempt to enforce a contract specifically prohibited by law.

Second: In the Merrill case the advice given by the County Committee that the crop was insurable was incorrect. In the present case the advice given by Lawson, both orally and in writing was, in fact, correct advice.

Third: There is nothing in the valid contract between plaintiffs and defendant in the present case which is not authorized by the regulations, to-wit: insurance against the loss of winter wheat by Winterkill.

Fourth: The Merrill case does not turn on lack of authority or estoppel. It is based squarely, and we belive only, on the point that Congress did not authorize the kind of contract sought to be enforced. In spite of the illegality of the contract, the decision was a 5 to 4 ruling.

For these reasons, it would appear that the Merrill case espouses no applicable law which will support defendant's position.

We submit to this court that from the facts in this record there is no basis in law, equity or justice why the government should be entitled to enter the crop insurance field, accepting the profits there-from and not be bound by the principles of insurance law which have been developed over a long period of time by the courts.

In construing the government's obligations under National Service Life Insurance, the Supreme Court denied certiorari in the case of *U. S. vs. Morrell,* 204 Fed. (2d) 490, 36 A.L.R. (2d) 1374, which case held that there was no reason why the government shouldn't be bound by some of the laws relating to private companies. The Court said (36 A. L. R. (2d), page 1380);

> "We do not think that the broad contention, that the general rules of law of insurance have no application to the liability of the government under its National Service Life Insurance policies, can be sustained. In the application of these rules the broad sweep of government activities and the relationship between the government and its countless employees are of course taken into account; and so it has been held that liability of the United States under these policies is not created by estoppel or waiver, based upon the acts or omissions of its agents, especially as they have no power to alter the insurance contract or modify the provisions of the statute. See James v. United States, 4 Cir. 185 F2d 115; Crawford v. United States, 2 Cir, 40 F2d 99. But it cannot be said that when the government enters the insurance business it is free because of its sovereign character

from all restraint, and that no heed be given to the principles of law that have been worked out by the courts in the field of insurance law."

We respectfully submit that the granting of the summary judgment is in error and that the holding of the District Court should be reversed.

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